No. 93-1199

In the Supreme Court of the United States

OCTOBER TERM, 1994

MARVIN STONE, PETITIONER

v.

IMMIGRATION & NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

WHETHER THE FILING OF A MOTION TO REOPEN OR RECONSIDER A FINAL ORDER OF DEPORTATION TOLLS THE TIME FOR SEEKING JUDICIAL REVIEW OF THAT ORDER.

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GROUNDS FOR JURISDICTION

Jurisdiction is proper under 28 U.S.C. 1254(1). A writ of certiorari was filed within ninety days of the judgement by the U.S. court of appeals in the proceedings below, *Stone v. INS*, 13 F.3d 934 (6th Cir.1994).

JUDGEMENTS BELOW

Stone v. INS, 13 F.3d 934 (6th Cir.1994)

In re Stone, A# 21 029 325, BIA Dec., February 3, 1993 (unreported)

In re Stone, A# 21 029 325, BIA Dec., July 26, 1991, (unreported)

STATEMENT OF THE CASE

Petitioner Marvin Stone is a businessman and citizen of Canada. He last entered the U.S. in 1977 as a visitor. The Immigration and Naturalization Service ("INS") began deportation proceedings against him in 1987 on the charge of being a nonimmigrant who remained longer than permitted. (Cert. Pet. App. B-3) A "special inquiry officer" or "immigration judge" found him deportable as charged, and denied his applications for discretionary relief due to statutory ineligibility at the time. In particular, petitioner was denied the privilege of voluntary departure from the U.S., and denied suspension of deportation pursuant to 8 U.S.C. 1254. The statutory

ineligibility arose from petitioner's conviction for mail fraud that resulted in his incarceration for eighteen months. Mr. Stone finished his sentence in 1987. (Cert. Pet. App. B-11,12)

The petitioner filed a timely appeal to the Board of Immigration Appeals ("BIA") raising a number of legal and factual issues. The appeal was dismissed and the BIA entered a final order of deportation against Mr. Stone on July 26, 1991. *Id.*

In August, 1991, Petitioner filed a motion to reopen and reconsider the BIA's order of deportation, which it denied on February 3rd, 1993. (Cert. Pet. App. B-16)

Petitioner then filed a petition for review in the U.S. court of appeals for the sixth circuit, on March 25, 1993. Mr. Stone sought review of the BIA's order of July 26, 1991. *Stone v. INS*, 13 F.3d 934 (6th Cir. 1994). The sixth circuit denied the

petition because, inter alia, it held that it lacked jurisdiction to review the underlying order of the BIA because the time for filing had passed. *Id.*

SUMMARY OF ARGUMENT

Petitioner believes this Court should rule consistently with its holding in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 96 L Ed 222, 107 S Ct 2360, (1987) which holds that a petition for review is timely if filed within the statutory period running after the denial of a motion to reopen or reconsider. The rationale underlying exhaustion doctrine is relevant, even though a motion to reopen is not needed to exhaust remedies. The Board of Immigration Appeals and our immigration judges deal with serious matters, such as the separation of American children from their parents, and the seeking of safe haven by people of disparate cultures from countries with complex political dynamics.

The BIA should be given the chance to correct its errors or evaluate the new evidence, before our federal courts are asked to rule.

Petitioner also believes that judicial economy and efficiency is best served by allowing tolling of the time for judicial review. The view of the Solicitor General and the court below would mandate the simultaneous seeking of judicial and administrative litigation. This is a recipe for cumbersome and repetitive activity in our appellate courts. Moreover, it is contrary to a 1990 mandate from Congress that the seeking of judicial review for a deportation order and the seeking of review for the ruling on a motion to reopen or reconsider shall be consolidated.

Finally, the Solicitor General and several circuits express concerns that petitioner's view allows aliens to abuse

the system and delay enforcement of our immigration laws. This concern was found to be groundless in a congressionally mandated study conducted by our Attorney General.

ARGUMENTS OF PETITIONER

I. INTRODUCTION

The Immigration and Nationality Act, (the "INA") 66 Stat. 163, 8 U.S.C. 1101 et seq., declares that judicial review of deportation orders is governed by the Hobbs Act, 28 U.S.C. 2341-51. *See* 8 U.S.C. 1105a (a). However, the INA prescribes a number of specific procedures for "judicial review of all final orders of deportation ...." *Id.* Unlike the Hobbs Act, "a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or in the case of an alien convicted of an aggravated felony,[1]

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[1]"The term "aggravated felony" means murder, any illicit trafficking in any controlled substance ... or firearms ..., [money laundering], any crime of violence

not later than 30 days after the issuance of such order." 8 U.S.C. 1105a (a)(1).

An order of deportation is final when the immigration judge's decision is affirmed by the Board of Immigration Appeals (BIA), or when no timely appeal is taken from an order of an immigration judge. 8 C.F.R. 3.37. Statute dictates that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws ...." 8 U.S.C. 1105a(c).

A motion to reopen or reconsider may be brought upon written motion to the BIA in cases where a BIA decision has been rendered. 8 C.F.R. 3.2, 3.8.

... for which the term of imprisonment imposed ... is at least five years, or any attempt or conspiracy to commit any such act." 8 U.S.C. 1101 (a)(43)."

This Court held in *Giova* v. *Rosenberg*, 379 U.S. 18, (1964) that motions to reopen were within the ambit of the term "final order." A year later, the ninth circuit relied on *Giova* to hold that if a motion to reopen were filed within the period for judicial review of a BIA order, and if a petition for review were filed within six months (the period allowed to seek judicial review at the time) of the ruling on that motion to reopen, the circuit court had jurisdiction over both orders. *Bregman v. INS*, 351 F.2d 401, 402. (9th Cir. 1965). *See also Chudshevid v. INS*, 641 F.2d 780, 783-84 (9th Cir. 1981); *Hyun Joon Chung v. INS*, 720 F.2d 1471, 1473,1474 (1983); *Fayazi-Azad v. INS*, 792 F.2d 873 (9th Cir. 1986); *Chu. v. INS*, 875 F.2d 777 (9th Cir.1989). The underlying rationale is that the filing of a motion to reopen or reconsider renders the BIA's order non-

final for the purposes of judicial review. *See, Id.* at 780.

The eleventh circuit also follows the rule in deportation proceedings that the time for judicial review is tolled by filing a motion to reopen. *Fleary v. INS*, 950 F.2d 711 (11th Cir. 1992).

Two additional circuits hold that "good faith petitions for administrative relief may toll or suspend the running of the time limit." *Pierre v. INS*, 932 F.2d 418, 421 (5th Cir. 1991), citing *Attoh v. INS*, 606 F.2d 1273,1276 n.15 (D.C. Cir. 1979). [2]

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[2] The circuits which allow petitioner's view that the filing of a motion to reopen tolls the time for judicial review --- a view that the Solicitor General believes allows abuse of our immigration laws --- are circuits that contain our border states. The INS reports that three of these states --- California, Texas, and Florida -

However, twenty one years after *Bregman*, a split in the circuits emerged in *Nocon v. INS*, 789 F.2d 1028, 1033 (3d. 1986), which held against tolling the time period for judicial review, on the basis that it contravened a desire of Congress to "prevent undue delay in deportation once an alien's immigration status had been decided." A number of circuits have recently held that the filing of a motion to reopen does not toll the time for seeking judicial review. *Akrap v. INS*, 966 F.2d 267 (7th Cir. 1992); *Bauge v. INS*, 7 F.3d 1540 (10th Cir. 1993); *White v. INS*, 6 F.3d 1312 (8th Cir. 1993); and, of course, the

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--- have our highest numbers of criminal aliens. Department of Justice, Immigration & Naturalization Service, *Report on Criminal Aliens*, April, 1992, at 8. Presumably, these diverse circuits would know best how our immigration laws should be interpreted in a fashion that is in the public interest.

decision below, *Stone v. INS*, 13 F.3d 934.

II. THE MAJORITY RULE ELSEWHERE IN ADMINISTRATIVE LAW --- THAT A MOTION TO REOPEN TOLLS THE PERIOD FOR JUDICIAL REVIEW --- SHOULD BE FOLLOWED IN IMMIGRATION

This Court held that a petition for administrative reconsideration stayed the running of the Hobbs Act's limitation period for the purpose of judicial review until that petition had been acted upon by the agency. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, at 284, 96 L Ed 2d 222, 107 S. Ct. 2360. This Court arrived at that result notwithstanding statutory language making it clear that final agency actions are final for judicial review, regardless of motions to reopen, reasoning that such language "has long been construed by this and other courts merely to relieve parties of the *requirements* of petitioning for rehearing before seeking judicial review ...." Id. at 285. [emphasis

original] Similarly, regulations state that a BIA order is "final," but the INA does not require an alien to move for reopening to exhaust his remedies because reopening is discretionary, not a matter of right. *See generally White*, 6 F. 3d at 1315.

Federal appellate procedure also recognizes that judicial review should be stayed pending the outcome of certain motions, such as a motion for relief from judgement due to newly discovered evidence, Fed. R. Civ. P. 60(b), or a motion for new trial or to alter or amend judgement, Fed. R. Civ. P. 59. *See* Fed. R. App. P. 4(4). [3] This Court has a rule that the time for filing a "petition for writ of certiorari runs from the date of the judgement or

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[3]The INS itself has used Fed. R. App. Proc. 4(4) to support Petitioner's position when it is to the advantage of the INS. See, e.g. *Chu. v. INS*, 875 F.2d 777,779 (9th Cir. 1989).

decree sought to be reviewed is rendered," *except* that "if a petition for rehearing is timely filed in the lower court by any party ... the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing ...) runs from the date of the denial of the petition for rehearing ...." R. Sup. Ct. 13.4

These precedents and rules are well founded, and should not be deviated from in the context of deportation proceedings.

A. POLICIES OF JUDICIAL ECONOMY AND EFFICIENCY ARE ADVANCED BY ALLOWING TOLLING.

If the filing of a motion to reopen or reconsider tolls the time for seeking judicial review, then the circuit court is in its best position to dispose of all of the agency's actions in one clean, consolidated review of the agency action.

If the alien's motion to reopen or reconsider is granted, and relief is ordered, then she has no need to use the court's time seeking judicial review. This would not be the case if she could not toll. She would have filed a petition for review along with her motion and consumed the court's resources needlessly. If motion to reopen is granted, but relief is again denied by the immigration judge and/or the immigration judge, then there is a considerable amount of additional material in the record that will be subject to issues for judicial review.

If the alien is forced to file a petition for review, before the motion to reopen and reconsider has been filed or decided, the circuit court faces a messy situation upon denial of the motion. Perhaps a new briefing schedule will have to be ordered in order to "consolidate" the

two reviews, causing delay, additional costs to the parties, and the court.

Even worse, if the motion to reopen is decided after dismissal of the petition for review, then the aggrieved party is allowed to file yet another petition for review. As Justice Warren stated for this Court, "Bifurcation of judicial review of deportation proceedings is not only inconvenient; it is clearly undesireable ...." *Foti v. INS* 375 U.S. 217, 232, 84 S. Ct. 306 (1963)

Under regulations in effect at the time this brief is being submitted, there is no time limit for the filing of a motion to reopen or reconsider. The opinion below could potentially create *more*, rather than less, dilatory practice. The filing of a petition for review brings an automatic stay of deportation. 8 U.S.C. 1105a(a)(3). A motion to reopen does not. 8 C.F.R. 3.8(a) Thus, an alien who is <u>required</u> to

seek judicial review --- or lose it --- could make the tactical choice to wait until the petition for review is filed or decided before exhausting his administrative remedies.

B. COMPETENT DECISIONMAKING IS ENHANCED BY ALLOWING TOLLING OF THE PERIOD FOR JUDICIAL REVIEW.

As the eleventh circuit reasoned, tolling the period for judicial review "gives the BIA 'the opportunity to correct [its] own alleged errors, and allowing [it] to do so prevents unnecessary burdens being placed on the courts of appeal.'" *Fleary*, at 713, citing *United States v. Ibarra*, ___ U.S. ___, 112 S. Ct. 4, 116 L.Ed. 2d 1 (1991).

This court should be concerned with allowing an a non-citizen to complete his motion to reopen, if he wishes, without

jeopardizing his opportunity for judicial review. While Congress and the executive branch is justifiably concerned with expelling undesirables, it is also concerned with due process in deportation proceedings. And, our deportation statutes have humane provisions that are in the national interest. This court has noted that deportation is a "sentence to a life in exile," *Jordan v. De George*, 341 U.S. 233 (1951) (J. Jackson, dissenting), and "an event that results in loss of property or life or all that makes life worthwhile," *Ng Fong Ho v. White*, 259 U.S. 276 (1922). There are many situations where an alien could raise significant issues on a motion to reopen, issues which the agency should deal with instead of immediately forcing the alien into federal court.

For example, our laws protect asylum

seekers under binding international treaty obligations. Protocol Relating to the Status of Refugees, 19 U.S.T. 6223; T.I.A.S. 6577, incorporating Geneva Convention Relating to the Status of Refugees, 19 U.S.T. 6260; T.I.A.S. 6577; Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 109. These asylum seekers are often in deportation proceedings. Motions to reopen, when they are sought, are often sought with respect to asylum requests, due to changed social and political conditions in the alien's homeland. [4] The "Supreme Court is reluctant to impute to Congress an intention that a federal statute dealing

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[4] Under the prospective regulations promulgated by the Attorney General at 59 Fed. Reg 29386, motions to reopen based on changed country conditions need *not* be filed within 20 days of final BIA order.

with the status of aliens is to be construed in such a way as to make likely curtailment of [administrative policies reflecting humane qualities]." *Leng May Ma v. Barber*, 357 U.S. 185, 78 S Ct 1072.

The INA also allows aliens in deportation proceedings to have their status adjusted to that of an alien lawfully admitted for permanent residence if the Attorney General is satisfied that three criteria are met, and that relief is warranted. The alien must be physically present in the U.S. for at least seven years, possess good moral character, and prove that deportation would pose "extreme hardship" or "exceptional and extremely unusual hardship" to the alien, or his U.S. citizen spouse, child, or parent. 8 U.S.C. 1254. The BIA has articulated a number of factors to be considered in such an

application, and motions to reopen are sometimes filed based on new equities to be considered. The BIA does make errors. *See Babai v. INS*, 985 F.2d 252 (6th Cir. 1993) (Petition granted, BIA failed to consider hardship to U.S. citizen child).

There is also the possibility that an alien could seek a motion to reopen or reconsider and fail to seek judicial review based on incorrect advice. Aliens have the "privilege" of having counsel in deportation proceedings, but at no expense to the government. 8 U.S.C. 1252(b)(2). Sometimes lacking language skills, aliens are susceptible to bad advice, if they obtain any advice. Even the petitioner, who had legal training himself, sought but obtained erroneous advice regarding the filing period for judicial review. *Stone*, 13 F.3d at . The importance of judicial review

should not be underestimated. *See Babai v. INS, 985 F.2d 252; Akinyemi v. INS*, 969 F.2d 285, 289-90 (7th Cir. 1992) (J. Ripple) (petition granted, BIA abused discretion in deportation proceeding involving criminal alien who had American family and genuine evidence of rehabilitation.)

C. UNWARRANTED DELAYS ARE NOT INHERENTLY PROBLEMATIC.

The Solicitor General has maintained that permitting a delay in judicial review "is not conducive to orderly administration of the immigration laws, because it is likely to lead to lengthy delays ...." (Resp. Cert. Br. 7) This concern was cited by the initial circuit that differed with the ninth circuit on the issue of tolling.

As discussed above, there are many

reasons why a non-citizen should be allowed to follow through with a motion to reopen, if he chooses, without losing the opportunity for judicial review. But, it should also be noted, that any "public costs" of such a policy are minimal.

1. ABUSES ARE NOT A SIGNIFICANT PROBLEM.

Congress in 1990 required the Attorney General to conduct a study of abuses associated with motions to reopen. IMMACT sec. 545 (c). That study found that there was "no pattern of abuse by aliens who fail to consolidate their applications for relief," and that *motions to reopen "constitute an extremely low percentage of the total case load" of deportation cases.* [emphasis added] "Finally, and perhaps most persuasively, an informal survey of a cross section of immigration judges ... indicates that there is *no evidence of aliens abusing*

the system." Reprinted in H. SKLAR & S. FOLINSKY, THE IMMIGRATION ACT OF 1990 HANDBOOK (1993), at A11E-1,2. (Appendix "A")

Congress has enacted a number of provisions in recent years to enhance our system for apprehending and deporting aliens with criminal convictions.[5] Those whom congress has deemed the most undesireable --- aggravated felons and particularly drug traffickers --- do not have the same types of relief available to them in deportation proceedings as other aliens might have. Aggravated felons are ineligible for voluntary departure, asylum, and suspension of deportation.[6] They thus have

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[5] See generally IMMACT sec. 501-515; Anti-Drug Abuse Act of 1988, Pub. L. 100-690, sec. 7341-7350.

[6] *See Id.*; U.S.C. 1152 (d), 1254 (e)(2), 1254(a)(1) & 1101(f)(8).

fewer issues for litigation and review, and thus the Attorney General can deport them in a more expeditious fashion. *See, e.g. Craddock v. INS*, 997 F.2d 1176 (6th Cir. 1993) (alien, who was eligible for INA 212(c) relief, concluded her criminal trial, deportation hearings, administrative appeal, and petition for review within two years). Thus, there is less potential for dilatory tactics for these aliens.

2. THERE ARE OBSTACLES TO DILATORY, ABUSIVE, OR MERITLESS ACTIONS.

The requirements for a motion to reopen are strict.

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully

explained to him and an opportunity to apply therefor was afforded him at the former hearing ...." 8 C.F.R. 3.2

This Court has stated that there are at least three independent grounds under which the BIA might deny a motion to reopen. *INS v. Abudu*, 485 U.S. 94, 108 S. Ct. 904, 99 L Ed 2d 90 (1988). The BIA may deny reopening even in the absence of opposition or response from the INS. *Limsico v. INS*, 951 F.2d 210 (9th Cir. 1991). [7]

The Immigration Act of 1990 requires the Attorney General to promulgate rules restricting the amount of time in which

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[7] Indeed, many agencies have regulations stating that a motion to reopen or reconsider will be deemed to be denied if the agency fails to act on it within a certain time period. *See* 10 C.F.R. 2.786(-c), 430.48(c), 501.134(f), 590.504 (Dept. of Energy); 16 C.F.R. 4.11(a)(1)(i ii)(O) (F.T.C.), 18 C.F.R. 385.916(b); 20 C.F.R. 31.14 (Dept. State), 29 C.F.R. 2700.70(g) (Mine Safety); 43 C.F.R. 431.8(6) (Dept. of Interior).

motions to reopen or reconsider can be filed. IMMACT sec. 545 (d). It also requires the Attorney General to set limits on the number of such motions that can be filed. *Id.* Legislative history expresses preference that the Attorney General promulgate a regulation that motions to reopen and reconsider be "made within 20 days of the date of the final determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider." H.R. Conf. Rep. No. 955, 101st. Cong., 2d Sess. p. 133 (1990). The Department of Justice has promulgated a regulation consistent with this legislative history. 59 Fed. Reg. 29386 (June 7, 1994). (Comment period expires August 4, 1994) The spectre of an endless cycle of motions to reopen and appeals, as bemoaned in a number of courts, seems to be illusory. E.g. *White 6 F.3d* at 1316; *Stone*, 13 F.3d at .

There are still more factors to discourage abusive motions to reopen. The Immigration Act of 1990 provided that

> The Attorney General shall, by regulation ---
>
> (1) define in a proceeding before [an immigration judge or the BIA] frivolous behavior for which attorneys may be sanctioned,
>
> (2) specify the circumstances under which an administrative appeal ... will be considered frivolous ... and dismissed,
>
> (3) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.
>
> Nothing in this subsection shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior. 8 U.S.C. 1252b(d).

Regulations are now in force regarding attorney sanctions for frivolous behavior in immigration proceedings. 8 C.F.R. 292.3 (15), (16).

Finally, an alien who is desperate to remain in the U.S. and who files a meritless motion to reopen or reconsider before

seeking judicial review does so at his peril. 8 C.F.R. 3.8(a) provides that "[t]he filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case." This is contrary to the result if he promptly seeks judicial review, which provides an automatic stay of deportation to all aliens except aggravated felons. 8 U.S.C. 1105a(a)(3).

III. STATUTE PERMITS THE TOLLING EFFECT OF THE FILING OF A MOTION TO REOPEN OR RECONSIDER

A.

The Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, contained the

following amendment to INA section 106:

> [W]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order.

IMMACT sec. 545(b)(3) This amendment has been cited by circuits on both sides of the tolling issue in support of their position. Plainly, the amendment is triggered by the filing of a petition for review of a final order of deportation from the BIA. It then requires any review of a motion to reopen or reconsider to be consolidated with the review of the final order of deportation.

This amendment is most easily given effect when the motion to reopen has already been decided at the time the petition for review is filed. And this situation is most easily enabled by permitting tolling.

Thus, the alien files her petition for review of the original deportation order, and she is on notice that any review of the motion to reopen must be consolidated with review of the original order. Prior to 1990, the alien could have sought two separate reviews, one for each order. [8]

On the other hand, in the case of an alien who seeks reopening or reconsideration at roughly the same time as judicial review, as required by the decision below, some courts on both sides of the tolling

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[8] The amendment could also be given effect when the alien files a petition for review first, and subsequently files the motion to reopen. The circuit court would have jurisdiction. *Ogio v. INS* 2 F.3d 959, 960-61 (9th Cir. 1993) Aliens seeking a motion to reopen or reconsider must state whether their deportation order is subject to judicial proceedings. 8 C.F.R. 3.8.

issue will proceed with the review despite a pending motion to reopen. *Alleyne v. INS*, 879 F.2d 1177,1181-82 n.748 (3d Cir.1989); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1255 (9th Cir. 1992) (for motions filed *after* the petition for review was filed). This enables the problem of repetitive actions in federal court when the motion is decided during or after the review.

Other courts will hold the review in abeyance until the BIA has adjudicated the motion to reopen. *Lozada v. INS*, 857 F.2d 10,12 (1st Cir. 1988) In this instance, any putative advantage in following the Solicitor General's view is nullified, since the effect if tolling is the same as holding a review in abeyence. In either event, the review does not proceed.

Indeed, if the circuit court enters a

judgement before the BIA disposes of the motion to reopen, the alien can then file a second petition for review of the adjudicated motion to reopen. *Giova*, 379 U.S. 18. This defeats the required consolidation, and the rule that "no statute ought to receive a construction that will render it nugatory, or which prescribes a rule utterly impracticable ...." *U.S. v. Tappan*, 11 Wheat 419, 426, 6 L.Ed. 509 (1826).

B.

This Court assumes that Congress was aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.* 111 S.Ct. 317, 112 L.Ed2d 275. This includes an awareness of judicial interpretations given to incorporated law, insofar as it affects the new law. *Lorillard v. Pons*, 434 U.S. 575, 581, 55 L Ed. 2d 40, 98 S Ct 866. In this matter, the conflict that arose

between the circuits on the tolling issue existed at the time the consolidation provision in the Immigration Act of 1990 was introduced and passed. Yet, there is no plain directive in IMMACT on the issue of tolling. Thus, it cannot be claimed that Congress intended a deviation from what was already the rule in administrative law, as announced in, e.g. *Brotherhood of Locomotive Engineers.* The eleventh circuit found "no legislative history of 8 U.S.C. 1105a(a)(6) that might prove helpful in determining" the tolling issue. *Fleary v. INS*, 950 F.2d 711, 713 (11th Cir.1992).

C.

An examination of the structure of the entire text of the relevant section of the Immigration Act of 1990 also yields little support for the opinion below.

The amendment is found in section 545, subtitled "Deportation Procedures; Required Notice of Deportation Hearing; Limitation on Discretionary Relief." While congress shortened the time for seeking judicial review in section 545(b), the same section as the consolidation requirement, it said nothing about motions to reopen, tolling, or how the time is computed.

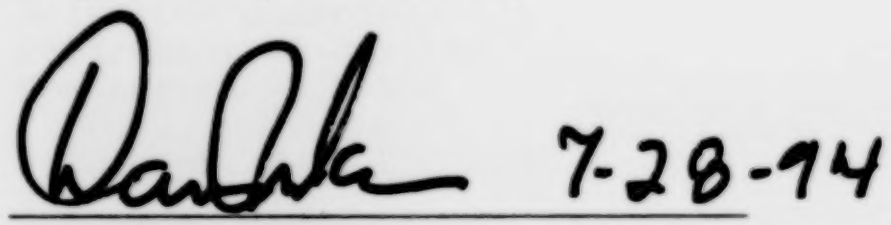
The next section, section 545 (c), also deals with "consolidation" of actions in deportation proceedings. It deals with the concern that aliens might be seeking one type of relief, say asylum, at their administrative hearing, and then taking another bite of the apple in a motion to reopen by asking for, say, suspension of deportation. This is the type of abuse of the system that the Attorney General found non-existent in his study, as noted earlier. But, if any inference is to be

drawn from section 545(c), it is that Congress aims for a single, linear series of actions where a certain type of proceeding is not repeated. In 545(c), Congress was concerned about aliens returning back to the "hearing on the merits" stage of deportation after they had already been there. Likewise, in petitioner's view, Congress does not want aliens returning to circuit court (or repeating steps in circuit court) after they have been there already. This can only be achieved by permitting a motion to reopen or reconsider a final order of deportation to toll the time for seeking judicial review of that order.

CONCLUSION

WHEREFORE, Petitioner seeks a remand of this matter to the circuit court of appeals to allow him the opportunity to file a petition for review under 8 U.S.C. 1105a.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Undersigned counsel certifies that three copies of this brief have been served on appropriate counsel by depositing them in the U.S. Mail, postage prepaid, to the following address, on the undersigned date:

Hon. Drew Days
Solicitor General
Department of Justice
Washington DC 20530

Attn: Hon. Beth Brinkman

7-28-94

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STATEMENT ON JOINT APPENDIX

The solicitor general and counsel for the petitioner have only designated items included in the petition for writ of certiorari for the joint appendix, namely the opinions and judgements below. Per Sup. Ct. R. 26, no additional joint appendix is being reproduced.

[A11E-1]

ATTORNEY GENERAL'S REPORT TO CONGRESS ON CONSOLIDATION OF REQUESTS FOR RELIEF FROM DEPORTATION

Introduction:

Section 545(c) of the Immigration Act of 1990 mandates that the Attorney General submit a report to Congress on perceived abuses associated with the failure of aliens to consolidate requests for discretionary relief before immigration judges at the first hearing on the merits. The Department has examined its current procedures to determine what safegaurds if any, exist to gaurd against the possibility of aliens abusing the hearing process by not consolidating their requests for relief. The Department has also examined statistical information which defines the possible parameters of the problem when compared against the entire case load. Finally, the Department has examined a cross section of immigration judges to

determine whether or not abuses of the kind stated in section 545(c) are widespread and significant.

The Department's conclusion is that there is no pattern of abuse by aliens who fail to consolidate their applications for relief. Current procedures, regulations, and case law contain restraictions to gaurd against such abuses. Also, an examination of statistical information establishes that the number of cases in which multiple applications are filed and [p.2, A11E-2] the number of cases in which motions to reopen are filed constitute an extremely low percentage of the total case load. Finally, and perhaps most persuasively, an informal survey of a cross section of immigration judges, those who deal with the deportation cases say-to-day, indicates that there is no evidence of aliens abusing the system by failing to consolidate the filing of applications for relief.

Current Law and Procedure:

Current law and procedure strongly discourage the piecemeal filing of applications for relief and safegaurd against abuse. The consolidation of filing for relief of deportation is mandatory under current law.

At the initial deportation proceeding before an immigration judge, typically a master calendar call, deportability is conceded and the immigration judge inquires as to what relief will be sought by the respondent. The respondent, often through counsel, indicates as to what relief will be sought, and is granted time to file the appropriate applications. In the typical case, the applications are subsequently filed and an individual merits hearing is held in which all applications are considered by the immigration judge. At the end of the merits hearing, the immigration

judge makes a decision on all forms of relief. Appeal rights are available to the Board of Immigration Appeals (BIA).

[p. 3, A11E-3]

Applications for relief which are made subsequent to a hearing must be made in conjunction with a motion to reopen. The motion to reopen, in order to be successful, must meet stringent requirements of 8 C.F.R. 3.2 and 3.8 (relating to the BIA) or 8 C.F.R. 3.22 and 8 C.F.R. 242.22 (relating to immigration judges). These sections read together clearly provide that motions to reopen must, among other things, present new evidence which was not available at the prior proceeding. These regulatory requirements assure that a motion to reopen will not be granted unless the evidence was not available previously. Therefore, the abuses described in section 545(c) are largely eliminated. In addition, current

case law undergirds the regulations by stressing that new evidence as well as a prima facie case and a favorable case on discretion must all be presented before a motion to reopen is granted. See Matter of Barrera, 19 I&N Dec. 837 (BIA 1989); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972); Matter of Lam, 14 I&N Dec. 98 (BIA 1972); also see, *INS v. Wang*, 450 U.S. 139 (1981). All of these requirements in current law provide ample protection against the abuses of not consolidating applications for relief as envisioned in section 545(c).

Under current law, it should also be noted that a stay of deportation is not automatic upon the filing of a motion to reopen. See 8 C.F.R. 3.6, 3.8, and 8 C.F.R. 242.22. Therefore, if an alien were to file an abusive, unmeritorious motion to reopen, attempting to file for relief that should [p. 4, A11E-4] have been applied for at an

earlier hearing, there is no reason why that alien cannot be deported immediately absent the granting of a stay by the immigration judge or the BIA. In sum, the current law constitutes a strong disincentive for piecemeal filing of motions for relief and creates a strong incentive for consolidated filings.

Statistical Examination:

An examination of the total number of cases in which multiple applications and motions to reopen were filed, [1] compared to the total number of cases, clearly establishes a low possibility of abuse, as illustrated by the following statistics:

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[1] These statistics exclude voluntary departure which is a minimal routine relief from deportation which is almost always requested as an alternate to other more substantive reliefs.

FY	TOTAL DEPORT. COMPLETED	DEPORT COMPLETIONS W/MULTIPLE APPLICATIONS	MOTIONS TO REOPEN
88	78,711	877	2,081
89	102,479	723	2,142
90	106,150	932	2,474
91 [2]	60,782	733	1,531

[p. 5, A11E-5]

As can be seen from the statistical information, the total number of cases that could possibly contain the abuses described in section 545(c) are less than five percent of the total. In fact, due to the safegaurds in current law, and as confirmed by our immigration judges (see below), even in this limited number of cases there is an absence of abuse.

The EOIR computerized information system tracks the applications for relief filed in each deportation case, but does not indicate when each application was filed. The statistical information

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[2] Based on six months of data.

presented shows all cases in which multiple applications were filed, but not whether they were filed together or in series. We know from surveying immigration judges, however, that in the majority of cases the multiple applications are submitted at the same time. This further confirms the absence of a pattern of abuse by aliens regarding the submission of applications for relief from deportation.

Immigration Judges Survey:

An informal survey of the Immigration Judges Advisory Committee was conducted in April 1991. This committee consists of a cross section of immigration judges from eight cities. These immigration judges are highly regarded for their experience and knowledge and are called upon by the chief immigration judge to advise him in matters affecting the immigration adjudication process nationwide.

The immigration judges surveyed unanimously concluded that there was no pattern of abuse associated with aliens not consolidating their applications for relief. They felt that the current case law, regulations and immigration judges sound discretion were adequate to discourage and basically eliminate the possibility of abuse that might be caused by an alien filing applications piecemeal in an effort to delay deportation. They had simply not experienced a problem in this area.

The immigration judges indicated that those who file subsequent applications for relief do so mainly based on alleged changed circumstances and new evidence. They stressed that motions to reopen are scrutinized to determine if the evidence in the motion is new and was not available at the prior proceeding. If the application

could have been presented previously, that motion would be generally denied. They also stressed that since there is no automatic stay on motions to reopen, the Immigration and Naturalization Service is free to deport an individual while a motion is pending, absent a specific grant of a stay of deportation.

Conclusion:

Based on a review of the current law, statistical information, and a survey of immigration judges, the Department concludes that there is no pattern of abuse by aliens because [p. 7, A11E-7] of their failure to consolidate requests for relief from deportation before immigration judges. The total number of multiple applications in cases and motions to reopen is relatively low, and the majority of subsequent applications are based upon an allegation of new facts, which is required by the regulations before an alien's case

may be reopened.

Because there is no evidence of the type of abuse cited in section 545(c), the Department is of the opinion that current law is sufficient to gaurd against further problems in this area. We will, of course, continue to monitor this issue and stand ready to implement new restrictions, if the situation warrants.